In the

# United States Circuit Court of Appeals

For the Ninth Circuit

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MASENORI TANAKA, *Appellant*

*vs.*

LUTHER WEEDIN, Commissioner of Immigration, *Appellee*

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## Brief of Appellant

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## STATEMENT OF THE CASE

The appellant, petitioner for a writ of habeas corpus in the court below, was arrested by the immigration officers April 10, 1923. Reasons for arrest and deportation given in the department warrant were

"that he (appellant) was a person likely to become a public charge at the time of entry; and that he entered in violation of rule 11 of the immigration rules."

Appellant deserted from the Japanese steamship "Africa Maru," while she lay at the Port of Tacoma, January 13, 1919. He did not submit himself for inspection or examination, but simply walked ashore from his ship. At the time of entry and prior thereto since 1911 he had served on board Japanese vessels as seaman and was then and there a duly certified and accredited Japanese seaman who was recognized as such by the United States immigration officers in October, 1918.

Appellant received from the Japanese Government a "Seaman's Book," called in thier language *Kaiin Techo* which all Japanese seamen were required to have under the Japanese Seaman's Act, No. 47, Promulgated March 8, 1899. The Seaman's Book (Kaiin Techo) is in the nature of a passport, or a declaration by the Japanese Government that the Japanese national using it enjoys the status of seaman, his government having officially recognized him as such by its issuance.

Appellant commenced to work as seaman on the steamship "Africa Maru" about one year before

he deserted from his ship and entered the United States. The master of the steamship "Africa Maru" took up his Seaman's Book when he joined his ship and kept it during his period of service on board said vessel.

On October 13, 1918 the United States immigration officers at Tacoma issued an alien seaman's card to him under subdivision 6 of Rule 10, 1917 Rules. Appellant's seaman's United States identification card was kept by the officers of the ship, and was in their possession when he left the vessel in January, 1919. This card and the visae endorsements of the United States officers were as follows:

"(Page 1)
Form L. Duplicate. No. S/506
UNITED STATES OF AMERICA.

"Alien Seaman's Identification Card issued under Rule 10 of the Immigration Rules and the regulations prescribed by the President in pursuance of the Act of May 22, 1918.

"Except in certain specified cases, it is unlawful for an alien seaman to land from any vessel in a United States port or to sail in a vessel from any such port unless in possession of this card, visaed incoming by an Immigrant Inspector and outgoing by a Customs Inspector.

"This card will be issued in the first instance to an incoming seaman by an immigration official; to an outgoing seaman by a customs official. It will then be completed by a customs official or an immigration official, as the nature of the case requires, and thereafter will be visaed by an immigration official or a customs official upon each arrival and departure of the holder, respectively. A duplicate of every card issued will be retained in the office of the immigration official in charge at the port of entry or departure.

"(See Sec. 10, Executive Order of Aug. 8, 1918, concerning passports and Rule 10, Immigration Rules.)

"This card is valid for use only in American ports. The nationality of the holder as given herein is based on his statements and other evidence, but is not conclusive.

"(Page 2)

"Port of Tacoma, Wash. (Photograph of Masenori or Masatoku Tanaka and left thumb print next follows.)

"Name . . O. Tanaka Masatoku. Nationality . . Japan. Place of holder's birth . . Kodhiken, Japan. Place of father's birth, Kochiken, Japan. Place of mother's birth, Kochiken, Japan. If naturalized abroad, where and when? . . No. Age 22, on 4/27/18. Height 5 feet 3 inches. Vessel S. S. "Africa M Flag . . Japn. Date of arrival . . 3rd Oct 1918. Description: Complexion . . Dark. Hair . . Black. Eyes . . Brown. Physical marks or peculiarities . . Mole below the left eye.

"(Page 3)
Port of Tacoma, Wash. Oct. 13, 1918.

"The person described on page 3 hereof has been examined by me. Having presented satisfactory evidence of his nationality and of his admissibility under the regulations, and having satisfied me that his status under Rule 10 of the Immigration Rules is Division 3, he is hereby granted permission to land in the pursuit of his calling, with the stipulation that this card must be visaed by an Immigrant Inspector on each subsequent arrival of the holder before he is permitted to leave his vessel. (Signed) A. T. Fulton, Immigrant Inspector.

"The person described on page 2 hereof has been examined by me, and, having presented satisfactory evidence of his nationality and of his eligibility to depart in accordance with the regulations, he is hereby granted permission to depart from the port above mentioned, with the stipulation that this card must be visaed by a Customs Inspector on each subsequent departure of the holder before he is permitted to sail. (No signature) Customs Inspector.
"(Page 4)

VISAS

"Subsequent arrivals in the United States:

"Port, Seattle. Date, 12/31/18. Vessel, Africa Maru. Signature of Immigrant Inspector, Tom L. Wyckoff.

"Port, Tacoma. Date, 1/8/19. Vessel, Africa Maru. Signature of Immigrant Inspector, H. Otto Gerpacher.

"Subsequent Departures from the United States:

"Port, Tacoma. Date, 1/4/19. Vessel, Africa Maru. Signature of Customs Inspector, (none)."

Appellant was in good health at time of entry. He was passed by the medical officers of the United States when the ship arrived. When the United States Immigration Service identification card was issued to him, viz, exhibit "C," attached to the record, Tanaka was not examined as to how much money he had then in his possession, nor as to his ability to sustain himself during the period of temporary residence accorded to an alien seaman under our laws before shipping out of the country, nor did the officials of the United States interrogate him upon this subject at any time after the steamship Africa Maru arrived in the United States from Japan. He was not examined as to whether he had a passport under the requirements of Rule 11 and no claim was made by the immigration authorities that this question entered into his case before the warrant was issued in 1923 in April. Note in the record:

"Q. That being so, Mr. Gowen, there was of course no question raised at that time of the two grounds mentioned in this warrant; that is to say, your Department did not, so far as appears from

your records, raise the point that he was here without a passport in violation of Rule 11, nor that he was then a person likely to become a public charge?

"A. As long as he remained a seaman, these questions were not raised.

"Q. He would not, in immigration practice, be arrested as long as he continued on the ship as a seaman, in the due administration of your work at this port?

"A. Certainly not, in the ordinary procedure of immigration officials.

"Q. And it is only now, Mr. Gowen, that having deserted, I suppose that your contention is that having lost his status as a seaman he is now in the position of one who entered without a passport?

"A. Having forsaken the calling of seaman he is no longer entitled to the exemption accorded seamen."

From the express language in and endorsements upon the identification card, exhibit "C," it appears that Tanaka was admitted to the United States as a seaman and given authority to land, although this authority, or permission, was probably withheld by the master of the steamship Africa Maru. See the terms of the card, exhibit "C," viz, page 3:

"*and having satisfied me that his status under rule* 10 *of the Immigration Rules is Division* 3, *he is hereby granted permission to land in the pursuit of his calling with the stipulation that this card must*

*be visaed by an Immigration Inspector on each subsequent arrival of the holder before he is permitted to leave his vessel.*"

Signed A. T. Fulton, Immigration Inspector.

Note the latest endorsement signed by "H. Otto Gerpacher—Tacoma 1/4/19."

The record shows the admission to land under the endorsement of Gerpacher, inspector, dated January 4, 1919, and that desertion occurred on the 13th.

From these facts the recognized legal status of Tanaka as a seaman subject of Japan appears conclusively by,

1. His Japanese seaman's card,

2. His service on the ship which brought him here,

3. His alien seaman's identification card issued by the United States immigration authorities.

The government officers will not contend to the contrary.

Appellant remained continuously in the State of Washington from date of entry until his arrest in a lumber camp in April, 1923.

At the hearing before the immigration officers the department waived the claim that appellant

"was a person likely to become a public charge at the time of entry,"

and rested its case squarely upon appellant's alleged

"violation of Rule 11 of the Immigration Rules (1917)."

Relief was denied in the department and the appellant filed his petition for a writ in the District Court at Seattle. At the hearing before Judge Deitrich sitting in the absence of our local judges, the United States attorney waived the public charge element and based his case on the supposed violation of Rule 11. The single issue in the case is whether the appellant's case, in view of the above facts comes within the protection of Rule 34, which provides for arrest and deportation within three years. Appellant had resided in the State of Washington continuously for four years and three months and had not committed any deportable offense, other than as the facts above can afford ground for deportation notwithstanding the terms of section 34 of the Immigration Act of 1917.

## SPECIFICATION OF ERRORS

Seven assignments of error are set out in the record but only one question is raised, viz, was

appellant entitled to his discharge or should he be deported. The District Court denied the writ.

## ARGUMENT

The District Court did not write an opinion. All we have in this case is the court's order denying the writ. The decision of the lower court was based upon *Ono v. U. S.*, 267 Fed. 359, as that case arose in this circuit and appeared to be about the only case where Rule 11 has been considered.

We have not had an opportunity to examine the record in the *Ono* case but respectfully urge that this court should re-examine the question in view of the very definite status of seaman established in this case, for it is our contention that Rule 11 has nothing to do with this case at all. It is said in the *Ono* case that the Japanese deserted his ship without a passport. Here the appellant had a passport or its equivalent. He was a duly accredited seaman who had been recognized as such by our immigration officers when they issued to him the alien seaman's identification card. His entry was neither surreptitious nor clandestine except that he escaped from his ship probably in violation of the master's orders. He had been given permission to land as a

Japanese seaman by the United States immigration officers, and his entry could only be called clandestine or secret because he did not again ask permission but simply entered as he had the right to do by the very terms of his seaman's card. What the master of the Japanese ship did in denying him the right to go ashore, and in taking up his card had no bearing upon his status as a seaman who had been given permission to land by our officers. This clearly distinguishes the *Ono* case from the case at bar.

We call the court's attention to the provisions in section 34 of the Immigration Act of February 5, 1917, which reads as follows, to-wit:

"That any alien seaman who shall land in a port of the United States contrary to the provisions of this act shall be deemed to be unlawfully in the United States, and shall, at any time within three years thereafter, upon the warrant of the Secretary of Labor, be taken into custody and brought before a board of special inquiry for examination as to his qualifications for admission to the United States, and if not admitted said alien seaman shall be deported at the expense of the appropriation for this act as provided in section twenty of this act."

Rule 10 makes provision for the enforcement of the immigration laws in the case of alien seamen. Subdivision 1 defines seamen. If there were any doubt as to whether or not the term laborer is broad

enough to include seamen within its meaning, the case of *Ellis v. United States*, 206 U. S. 246, 51 L. Ed. 1047, removes any such possible contention by squarely holding that laborers and mechanics are not included within the meaning of the term seamen. By the terms of subdivision 1,

"Only aliens who come within such definition shall be treated in the special manner herein specified. The cases of all others shall be handled in accordance with the general requirements of the Immigration Act, and of other Immigration Rules herewith promulgated, all in accordance with the treaty, laws and rules governing the admission of Chinese."

The clear intention of the Department is to exclude all aliens except alien seamen from the operation of Rule 10 and section 34, or stating it affirmatively, it is the expressed intention under this rule to classify and treat seamen under section 34 and Rule 10 in a manner wholly different from other aliens. Rule 11 relates wholly and solely to unpassported laborers, clearly distinguishing them from seamen who come under different provisions of the law. *Ellis v. United States*, *supra*, makes clear the distinction between deck hands and ship laborers on the one hand and ordinary laborers on the other. Subdivision 3 makes provision for listing, register-

ing and identifying the same. Under sub-paragraph "d" of subdivision 3, provision is made for a report to the Department of desertions among the seamen. Sub-paragraph "e" of this same subdivision provides for the registration card, one of which was given to the alien in the instant case. By the terms of this sub-paragraph, a complete description of the man is required. His status as a seaman is defined and set out. It is the intention of the Department under this subdivision of Rule 10 that the seaman shall have this card to enable him to go about at will in the seaports of the United States. Subdivision "f" prohibits his landing without registration and the issuance of this card.

Under subdivision 4 provision is made for the immediate medical examination of an alien seaman when his ship arrives at the port of entry. At the outset if he is found to be afflicted with mental defects or physical disease as would mandatorily prohibit his entry under section 3 of the Immigration Act, he is not permitted to land, but must be detained on board or placed in a hospital in accordance with sections 32 and 35.

Subdivision 5 of Rule 10 provides that a certain class of seamen shall in no circumstances be permitted to land permanently in a port of the United

States. Provision is made under this subdivision for his support, maintenance and hospital treatment upon ship-board or ashore in order that he may be cared for in a humane manner.

Subdivision 6 covers his primary immigration inspection, under which he is classified as being in one of three divisions for identification purposes.

Subdivision 8 defines the office of identification card, and subdivision 9 provides for the arrest of violators and their subsequent deportation for violation of the immigration law and rules under section 34.

In *United States v. Jamieson*, 185 Fed. 165, a Chinese seaman, who was a member of the crew of a vessel calling at the Port of New York was held not to be a laborer so as to charge the master of a vessel with knowingly attempting to land a Chinese laborer.

*Taylor v. U. S.*, 207 U. S. 120, 52 L. Ed. 130, makes it clear that deserting seamen are not in the class of aliens, who, if they escaped from their ship, place responsibility upon the ship or her officers for an unlawful landing. The United States Supreme Court in this case reversed the Circuit Court of Appeals in the Second Circuit following the dissenting opinion in that court of Judge Wallace. Note

the following pertinent observation by Judge Wallace in the dissenting opinion:

"Section 2 is devoted to a preliminary enumeration of the classes of aliens who 'shall be excluded from admission into the United States.' This enumeration is somewhat more in detail than that contemplated by the provisions of section 13, but does not necessarily include any aliens who do not come intending to reside in the United States, and does not mention sailors. There is not a provision in the act which indicates any intention to embrace sailors in the classes of aliens to be excluded, otherwise than by the mere use of the term 'aliens.' Many of the provisions in which the classes are referred to by this comprehensive term are such as would be absurd, if they were intended to apply to sailors. Section 13 is an illustration, and it can hardly be seriously argued that here Congress intended to require the master of the vessel to give each seaman a ticket to identify himself and his family, and then to require the master to swear that he believes that no one of his sailors is an idiot or a prostitute.

"These considerations would suffice to lead to the conclusion that section 16 does not by reasonable construction include sailors under the general term 'any aliens'; but they are reinforced because at the time of the enactment it was perfectly well understood that the alien exclusion laws did not apply to sailors. This had been so decided in United States v. Sandrey, (C. C.) 48 Fed. 550, and in United States v. Burke, (C. C.) 99 Fed. 895.

"In the latter of these cases the court said:

" 'These statutes do not contemplate the exclusion of crews of vessels which lawfully trade in our ports, and they do not, in spirit or in letter, apply to seamen engaged in either calling, whose home is on the sea, who are here today and gone tomorrow, who come on a vessel into the United States with no purpose to reside therein, but with the intention when they come of leaving again on that or some other vessel, for the port of shipment or some other foreign port in the course of her trade. To hold that these statutes apply to aliens comprising the bona fide crews of vessels engaged in commerce between the United States and foreign countries would lead to great injustice to such vessels, oppression to their crews, and serious injuries to commerce.'

"The attorney general of the United States had formulated an opinion on the subject to the same effect, and had so advised that department of the government charged with the administration of the alien exclusion laws. He said:

" 'That, although it was true that Congress had not excepted them (seamen) from the express language of these statutes, in the practical administration of these laws they have always been excepted, and their inclusion in the class of alien immigrants would lead to consequences so destructive to legitimate commerce, that such inclusion could fairly be regarded as beyond the intention of Congress.'

"In view of the decisions of the federal courts whenever the question had been presented, the opin-

ion of the chief law officer of the government, and the construction which had been placed upon the pre-existing legislation by the administrative officers of the government, the circumstances that in the revision no change was made specifically enlarging the class of prohibited aliens so as to include sailors, is significant that Congress had no intention of including them."

See, also, the case of *United States v. Atlantic Transport Company*, 188 Fed. 42. Horsemen engaged to look after horses brought into this country on ship-board were in this case classified as seamen under the Immigration Acts. If the term "seamen" is to be defined as clearly intended in the act and as clearly provided for in Rule 10, and if these decisions above referred to mean anything, it is clear that Rule 11, which refers to laborers entering the country without a passport has no application in the instant case. Masenori Tanaka did not come under the operation of Rule 11. His status as a passported or non-passported alien laborer was never at any time taken into consideration nor suggested by the record until the formal charge was written into the warrant for deportation in April, 1923, four years and three months after his entry. Clearly he can not in these circumstances be regarded in law and at this late date charged as entering the country as an alien laborer without a passport

in violation of the President's Proclamation and Rule 11, nor can he by any stretch of reasoning be regarded at this late day as an alien who was likely to become a public charge at the time he entered, and that by reason of this likelihood he is now subject to deportation. He was never at any time subjected to examination under section 3 as an entering alien. His status as such from the standpoint of his becoming a public charge was never at any time discussed or ever thought of. He was classified arbitrarily under division 3 in the Immigration card divisions, which merely classified him as a person not entitled to enter the United States permanently. By the very terms of this card he was, however, classified as a seaman with the right to temporarily enter and remain in the United States. By the clear terms of section 34 he should have been apprehended and deported within three years from the date of his unlawful entry into the United States as a seaman. He can not be deported for the reason that the deportable limit mentioned by section 34 has been reached and passed. Any construction contrary to this must rest upon purely arbitrary considerations, and not upon the established rights of the alien under section 34 and Rule 10.

We respectfully urge in view of these points raised that there is no authority at this time under the law for the deportation of Masenori Tanaka for any of the reasons or causes mentioned in the warrant and that by reason of the premises the present deportation proceeding should be dismissed and the alien released from custody under a writ of habeas corpus which should be ordered by this court.

We respectfully invite the court's attention to the language of the two proclamations which are set out at length in the *Ono* case at 267 Fed. page 362. They differ from each other in that the later proclamation by President Taft eliminates the words "Japan, Korea, Mexico, Canada and Hawaii" from the text. In its modified form it might refer to any foreign government, who had been issuing passports to places other than the continental United States, and whose passports so issued were being used to enter the United States. The only difference is that the later one eliminates the language found to be objectionable by Japan in the earlier one. Inasmuch as the modified proclamation by President Taft contains the same language as the earlier one in the part that we wish to comment upon, we shall refer to the present existing proclamation which has made the basis of Rule 11. In the first paragraph of the

proclamation, reference is made to the Act which makes it the duty of the President to refuse to permit citizens of any country from entering the United States upon passports issued by certain foreign governments permitting them to go to countries or places other than continental United States. In the second paragraph it recites that the President is satisfied that certain foreign governments are issuing passports to unskilled laborers to go to places and countries other than the continental territory of the United States, which passports are being used by the holders thereof to enter the continental territory of the United States. With these two paragraphs as a preamble the order was made as follows:

"I hereby order that such alien laborers, skilled or unskilled, be refused permission to enter the continental territory of the United States."

The phrase "such alien laborers" can only refer to the alien laborers who had received passports to "go to any country other than the United States." In other words it appeared to Congress and the President that certain countries (including Japan), were issuing passports to its laborers to go to Canada, or Mexico, and that these same passport holders afterwards had used them or were using them to gain admission to the United States. The direct

terms of the order refer to the alien laborers of this class, that is those who had been duly passported to contiguous countries. In fact fairly construed this proclamation does not reach the case of an alien coming to the United States directly from Japan without a passport. By it in clear terms it only reaches those aliens who present themselves to the continental territory of the United States with a Mexican or a Canadian passport. Section 3 of the immigration rules in order to override this obvious objection to the practice of the Department provides as follows:

"If such a laborer applies for admission and presents no passport, it shall be presumed:

"(1) *That when he departed from his own country, he did not possess a passport entitling him to come to the continental territory of the United States; and*

"(2) *That at that time he did possess a passport limited to some country, or place, other than continental United States.*"

By what right does the Department create such a presumption and how can such an arbitrary rule conclusively creating a presumption apply to the instant case, or to any case where the fact is contrary to the presumption? How can the Department say conclusively that a man does not possess one kind of a passport, but does in fact possess

another kind of a passport, when in truth and in fact he has no passport at all, and never intended to go to any other place than the continental United States, and how can these arbitrary presumptions of the Department affect the case of a seaman who is not a laborer, skilled, or otherwise, according to the definition of the United States Supreme Court, and who in fact had no passport at all? If his seaman's card (*Kaiin Techo*), can be considered as a passport, how can any presumption one way or the other be indulged in? The fact that the Department has been driven to the necessity of creating an arbitrary presumption, as appears by the quoted subdivision, shows the weakness of the Department's position in trying to reach laborers who in fact have not been passported at all.

The whole purpose of this arbitrary presumption in the Department of Rule 11, is to create a Japanese exclusion act without the permission of Congress. The Department has made a little Japanese exclusion law of its own in adopting this rule. It was for this reason that we at the outset urged that this whole question, in view of our contentions, should be re-examined by this court. In any event appellant was not smuggled into the United States because he had been given permission to enter the United States by the immigration officers. He was either wholly

without a passport, so that Rule 11, even though there were no expressed statute upon the subject, would have no bearing upon his case by the very terms of the proclamation itself, or he had the equivalent of a passport in which latter event it could not apply. If his *Kaiin Techo* may be considered as the equivalent of a passport, then Rule 11 does not apply, because it was not a passport issued to him for the purpose of going to a country other than continental United States, to-wit, Mexico, or Canada. The weakness of the Department's contention is established when it appears that the appellant was a duly accredited Japanese seaman who had been recognized as such, both by his own country and by our immigration officers. In view of the definition of the Supreme Court of the United States as to what constitutes a seaman, as distinguished from a laborer, together with the definition of a seaman in the rules, and in view of the express provision of section 34 of the Immigration Act, we respectfully urge that the appellant is entitled to be and remain in the United States at least until such time as he may be excluded under a proper law of Congress upon the subject. The writ should be granted.

Respectfully submitted,

WINTER S. MARTIN,

*Attorney for Appellant.*